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Nos. 37-38

OCTOBER TERM, 1929.

IN THE

Supreme Court of the United States

WABASH RAILWAY COMPANY, MYRON S. HALL, H. W. COHU, et al., Petitioners,

v.

JOHN C. BARCLAY and WILLOUGHBY COMPANY, Respondents.

SHIRLEY P. AUSTIN, Petitioner,

v.

JOHN C. BARCLAY and WILLOUGHBY COMPANY, Respondents.

PETITION OF THE RESPONDENTS FOR A REHEARING.

WILLIAM R. BEGG,
JOSEPH S. CLARK,
ELLIS AMES BALLARD,
Counsel for Respondents.

Supreme Court of the United States

OCTOBER TERM, 1929. NOS. 37-38.

Wabash Railway Company, Myron S. Hall, H. W. Cohu, et al.,

Petitioners,

v.

John C. Barclay and Willoughby Company,

Respondents.

Shirley P. Austin,

Petitioner,

v.

John C. Barclay and Willoughby Company,

Respondents.

PETITION FOR REHEARING.

Now come the above named Respondents, John C. Barclay and Willoughby Company, and present this, their Petition for a Rehearing of the above entitled cause, and in support thereof respectfully show:—

The case is an important one, otherwise this Court would not have granted the petition for *certiorari* and, in addition, the opinion affects seriously not only the dividend rights claimed by the Preferred A stockholders, but also similar rights claimed by the holders of the large amounts of non-cumulative preferred stock issued by railroad and other companies operating in this country. In view of the importance of the case the basis of the decision should be fully discussed and considered.

The particular dividend the payment of which the Bill seeks to enjoin is a dividend on the Preferred B stock declared on November 30, 1927, payable on February 6, 1928, out of the excess earnings of 1927 and not out of the general surplus (Paragraph 13 of the Statement of Claim and Answer and Affidavit of Begg, Record, pp. 8, 33 and 63) and, so far as there is any indication in the record, it was the intention of the Company to pay additional B dividends and common dividends out of similar annual excess earnings.

The issue is the meaning of the word "non-cumulative." On this point the Court adopted the common understanding of lawyers and business men, which is stated in the following language:—

> "We believe that it has been the common understanding of lawyers and business men that in the case of non-cumulative stock entitled only to a dividend if declared out of annual profits,

if those profits are justifiably applied by the directors to capital improvements and no dividend is declared within the year, the claim for that year is gone and cannot be asserted at a later date."

This sentence suggests the following points:—

(*a*) Is the Preferred A stock "entitled only to dividends if declared out of the annual profits"? Dividends are more frequently paid out of the general surplus. Is there any common understanding of lawyers and business men to the effect that non-cumulative preferred stockholders have no right to dividends declared out of the general surplus created in whole or in part by the earnings of prior years which might within those years have been declared to said stockholders as dividends? Have they any understanding in regard to such dividend rights? Is not any understanding they may have on the subject limited to this: That if the annual profits are justifiably applied to capital improvements the non-cumulative dividend rights for that year, so far as payment out of those profits is concerned, are lost?

(*b*) Is it not a part of their understanding that if non-cumulative dividends for a particular year are earned and declared within the year, payable out of the general surplus, the stockholders have some rights in such dividends; or do they understand that all such dividends belong to the common stockholders?

(*c*) Was not this understanding the result of the decision in the Nickals case in which the demand for a declaration and payment of non-cumulative preferred dividends for a prior year was denied because the annual earnings had been applied to pay for capital improvements? It is admitted that the point involved here was not involved in that case. That case has been fully discussed in Respondents' Brief at pages 9 and 28.

(*d*) Even though annual earnings may be used to pay for capital improvements the treasury may be reimbursed in the future by sale of capital securities and the proceeds may be used at that time to pay dividends, or the Board may pay a dividend in stock issued against such capital improvements. Any such dividends will be charged against the general surplus accumulated in past years. Have non-cumulative preferred stockholders no interest in such dividends?

Notwithstanding the application of the net earnings of prior years to capital improvements said earnings were credited to the surplus account, which appears on the liability side of the balance sheet, and a corresponding addition to the plant and property account appears on the other side. As of December 31st, 1925, this surplus account amounted to over $27,000,000. (Record, p. 64) of which approximately $16,000,000. represented the earnings of prior years which might have been used to pay Preferred A dividends (Record, p. 66).

Many of the cases cited in Respondents' Brief involved non-cumulative dividends for prior years paid out of the general surplus and the dividend right of the preferred stockholders was recognized over the objection of the common stockholders.

(*e*) Is it necessary that a declaration of a non-cumulative dividend shall expressly state that the dividend is paid out of the profits of a particular year rather than out of the general surplus? What is the understanding on that point?

Many contracts defining the respective dividend rights of non-cumulative preferred and common stockholders expressly authorize the payment of common dividends out of the earnings of subsequent years even though non-cumulative preferred dividends earned in prior years still remain unpaid. Note the Southern Railway contract referred to in the Norwich Water Power case (Respondents' Brief, p. 51), and the Reading Railway contract discussed in the Continental Insurance Company case (Respondents' Brief, p. 33). There is no such provision in the Wabash contract.

(*f*) If as in the present case a part only of the earnings of a particular year are applied to capital improvements and another part to increase the working capital, does this fact affect the conclusion, or the understanding of lawyers and business men?

(*g*) This understanding as defined in the opinion is not in accord with the meaning of the word "non-

cumulative" which is recognized in the decided cases and text books, all of which are discussed in Respondents' Brief commencing with the Dent case in 1880 and ending with the decision of the Circuit Court of Appeals in the present case, of which authorities the lawyers are presumably advised.

We respectfully submit that there is no proof in the record of any such common understanding, nothing to advise us as to its extent or limitations, that no particular point was made in regard to it either in the briefs or in the oral argument, both parties citing the decided cases and text books in support of the meaning of "non-cumulative" presented by each, that the stockholders whose rights are dependent upon the meaning of that word include not only lawyers and business men but many others who do not qualify in either class, and that if a rehearing is granted this very important matter can be fully discussed and presented.

For the foregoing reasons it is respectfully urged that this Petition for a Rehearing be granted, and that the decree of the Circuit Court of Appeals for the Second Circuit be, upon further consideration, affirmed or modified.

Respectfully submitted,

WILLIAM R. BEGG,
JOSEPH S. CLARK,
ELLIS AMES BALLARD,
Counsel for Respondents.

CERTIFICATE OF COUNSEL.

I, Joseph S. Clark, counsel for the above named Respondents, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

JOSEPH S. CLARK,
Counsel for Respondents.